IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARCHIE K. BABSON and VICTOR J. TRIAL, Appellants, v. UNITED STATES OF AMERICA, Appellee.	NO. 18410

CONSOLIDATED BRIEF OF APPELLEE

CECIL F. POOLE
United States Attorney

FREDERICK J. WOELFLEN
Assistant United States Attorney

Attorneys for Appellee
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK J. WOELFLEN
Assistant United States Attorney

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES CITED

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARCHIE K. BABSON and VICTOR J. TRIAL, Appellants, v. UNITED STATES OF AMERICA, Appellee.	NO. 18410

CONSOLIDATED BRIEF OF APPELLEE

JURISDICTION

This is a timely appeal from judgment of conviction for violation of Title 18 U.S.C. Section 1341 (Mail fraud) and Section 371 (Conspiracy) in the United States District Court for the Northern District of California, Southern Division.

Jurisdiction on appeal is invoked under Title 28 U.S.C. Sections 1291 and 1294.

EXPLANATORY NOTE REGARDING STATEMENT OF FACTS

Because of the voluminous transcript references required to support the Statement of Facts of the Government, we have collected all transcript references in an Appendix to the Brief.

The Appendix is keyed to the Statement of Facts by a reference number, e.g. 1, 2, 3, 4, etc., which appears in the Statement of Facts at each juncture where a transcript reference would ordinarily occur.

By finding the reference number in the Appendix, the reader is given the collected transcript references pertaining to the facts stated in the Statement of Facts.

STATEMENT OF FACTS

Appellant Archie K. Babson was found guilty by jury on count one (Conspiracy) of the indictment and on fifteen counts of mail fraud (Counts 2, 3, 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, 18, 20 and 21).

Appellant Victor J. Trial was found guilty on count one (Conspiracy) of the indictment and counts sixteen and twenty (Mail Fraud).

The basis of the conspiracy and the substantive charges of mail fraud arise from a correspondence course conceived by Appellant Babson, operated by Babson and others in corporate or fictitious name status under the various business names of United Jet Training, United Jet Schools, National Jet Training and United Jet Institute. (Exs. 1, 2, 3, and 4). The conspiracy began about February 1, 1956, under the name of United Jet Schools, a corporation. (See: Indictment, count one).

These various business establishments were created to conduct a home study correspondence course allegedly for the purpose of training individuals how to become jet airplane mechanics specialists in the aviation and airline industry.[1/] Various categories of jobs for which the students were to be trained are set forth in the exhibits on file in this case. [See, for particular reference, Exhibits 14, 17, 30, 43, 23, 158, 54, 57 and 167.]

The mail fraud was conceived by the use of business reply cards mailed to householders, post office box holders, rural mail box holders, or placed on the windshields of automobiles. These cards described the course and the qualifications that the student would have on the completion of the course, the salaries they could obtain upon graduation and the approval of the course by major jet airlines and members of the jet industry.

In many instances the general public filled out these business reply cards and mailed them back to the school.[2/] Between 1956 and 1957 the school was located in San Francisco, at the old International Air Terminal of the San Francisco Airport, and at an address on Linden Avenue in South San Francisco. Upon receipt of business reply cards from the prospective student, "school registrars," who were in fact salesmen, followed up and personally interviewed and enrolled the applicant. The enrollment procedure was unique in that only one interview was allowed and the wife of the prospective student was required to be present.[3/] During the course of these interviews the false representations were made concerning the course and that for which it would qualify the student upon completion.

The false representations made by the registrars were:

(a) The course was approved by major airlines and members of the jet industry, who were hiring graduates of the school;[4/]

(b) Upon completion of the course the student could expect to receive a salary of between $8,000 and $15,000 a year;[5/]

(c) The course was nationally accepted;

(d) Upon completion of the course, the men would not be merely mechanics, but supervisors of jet mechanics, inspectors and turbo jet specialists and analysts;[6/]

(e) In some instances it was represented that the course was based upon classified information, thus requiring a security check concerning the background of the applicant.[7/]

False representations were additionally made to the applicant that during the time he was taking the correspondence course (which consisted of two different courses, one of fifty-two lessons under the United Jet Institute and one of thirty-two lessons under the National Jet) there would be made available to them seminars at the school's place of business in San Francisco, at which time there would be jet engines available for the students to work on with tools supplied by the school.[8/]

The price of the course ranged from $400 to $600.[9/] The "registrar" endeavored to obtain as much of a down

payment on the course as would be possible from the student, securing the balance on a promissory note from the applicant. Thereafter, the student received his lessons from which he prepared examinations which were sent to the school for grading.

Of the 1400 students who enrolled in this course, few, if any, were mechanically inclined. They had such backgrounds as logger, painter, lumber worker, service station lubrication man, carpenter, cement finisher, upholsterer, baggage handler, insurance claims adjustor, and apprentice bricklayer.[10/] In many instances, the students enrolled by the schools had at most, a high school education, with little or no mechanical background. After enrollment the student, no matter what his background, received grades in his examinations ranging from 85 percent to 100 percent.[11/]

Contrary to the representations made by the "registrars," by the appellant Babson, and by the appellant Trial, the course was not approved by any airline or members of the jet industry. United Airlines would not recognize the school or approve the course.[12/] Neither did other business in aviation or jet industries. "Classes" were, in the main, "bull sessions" conducted by student instructors.[13/] An airplane engine was supplied for so-called "classroom work"--in a burnt out and damaged condition--a "basket job," (bordering on junk),

impracticable for use in demonstrations. At no time were any tools supplied to the students for the purpose of working on any jet engine.[14/] From expert testimony it was established that the course, as prepared, could not qualify a man to become a supervisor jet specialist or instructor in jet engines, but at the most would qualify the individual as an apprentice mechanic earning approximately $2.20 an hour.

The course was completely inadequate and would not provide any basis for hiring a man without formal on-the-job training. Contrary to the representations made by the appellants Babson and Trial, both through their salesmen and personally, there were no such classifications as a jet specialist in the airline industry. Supervisors of maintenance were not hired off the street and only attained the position after five years of work on the job and then only at a salary of from $8,000 to $10,000 a year. Despite the highly glowing representations of the appellants, made in their mailed brochures and literature and through their "registrars," no individual could become qualified as a jet mechanic through a correspondence course; the course having little value except as conversational knowledge.[15/] The course was replete with errors. (Record, p. 112).

Through United Airlines' individual program of training it would take a man four years to obtain the status of

a qualified jet mechanic and approximately five years to obtain the status of a supervisor of mechanics.[16/] In numerous instances, upon completion of the course, individuals seeking employment with airlines or jet engine manufacturers, were advised that the school and the course were not recognized and their training would be of no assistance in their being hired.[17/]

The course which the students were studying concerned the J-34 jet engine, when in fact the obsolete burnt out engine placed in the school for alleged job work was a model other than the J-34. (Record, p. 154). The "training course" was written by co-conspirator James Porter who was in many instances writing the lessons one step ahead of the students. (Record, pp. 739, 741-42). Mr. Porter wrote the course from a book given to him by Mr. Babson, which was a declassified manual authored by Westinghouse Company, for use as a parts and maintenance manual.[18/] Mr. Porter lifted material from this manual and placed it in context but out of order in the lessons. (Record, p. 1140)

Among the representations made to the students was one that following the completion of their course, a free placement service would be available to them for securing employment. No such placement service existed.[19/]

From the early part of 1956 until September 1957, no student had graduated from the school, which had an

enrollment of about 1,400, even though the salesmen and the appellant Babson represented to the prospective students that graduates had been placed with major airlines and jet maintenance facilities.[20/]

The appellant Archie K. Babson hired all personnel, including co-conspirators, all of whom admittedly sold courses to different students and represented to them some, if not all, of the false representations heretofore recited. Babson trained the salesmen and gave them a "sales kit" which was to be used to impress the prospective students of the quality and efficiency of this home study course. All of the mail matter sent out in connection with the procuring of students and the advising of students regarding the course and what they could expect and anticipate upon completion of the course by way of job classification and salary, was prepared and/or approved by Babson.[21/]

Appellant Victor J. Trial was associated with appellant Babson as a sales manager for approximately nine months from August 1956 until April 1957. During this time he sold 125 courses to various students and made various false and fraudulent representations regarding the classifications, salaries, on-the-job training and employment opportunities.

The Government's first witness at the trial was a student, Jack Giolitti. Mr. Giolitti testified that he was a watchmaker. He enrolled with United Jet Training in

ıly of 1957, after receiving a post card in the mail. (Ex. 2). Upon receipt of that post card he went directly to ıited Jet and conferred with Babson. Babson told him the rice of the course was $435 of which $145 would be a down ayment; Babson falsely represented to Mr. Giolitti that udent graduates were working at Aerojet and T.W.A. and the hool had placed these graduates in these positions. bson falsely represented to Mr. Giolitti that Mr. Giolitti uld work as a jet specialist, supervising men and not working the assembly line; that the airlines were interested in bson's graduates; and that Mr. Giolitti could obtain a salary to $1,000 a month upon completion of the course. Mr. Giolitti gned for the course and paid for the course in full.

. Giolitti's testimony which appears at Record, pp. 71-96, lated primarily to count two of the indictment. Babson was nvicted upon count two.

Babson sent out or authorized the sending out of business ply post cards. These cards represented that Babson wanted ly highly qualified men for whom he could obtain jobs of supervisory capacity at salaries far in advance of the en going rate.

The truth of the matter was that Babson sent out or horized the sending out of business reply post cards or to ever checking with the airlines of jet aircraft lustry the salaries they were paying or their job

qualifications. Babson had, in fact, in preparing the alleged qualifications for prospective students, lifted in toto the contents of a qualification chart he had previously used in a correspondence course for practical nursing. This was the only aptitude guide ever used by Babson. (Exs. 324, 325). Babson represented to the Better Business Bureau in 1956 that the course was approved by the vice-presidents of major airlines and maintenance companies, whereas no such approval was ever secured. (Ex. 277). On many occasions Babson represented to students and salesmen that necessary equipment would be secured for classrooms, whereas none was secured except for a damaged, burnt and wrecked jet engine which he procured in a Los Angeles junk yard. (Record, p. 755). In much of the correspondence sent out to prospective students and following their enrollment, there were no dates placed thereon. (Record, p. 1677). Babson, in an attempt to sell the course, constantly extorted his students to paint a rosy picture of the course and its advantages and to use anything by way of ammunition to sell the course. (Record, pp. 1445-1446). [Babson's sales technique is fully set forth in Exhibit 161]. An additional sales presentation containing many of the misrepresentations sent through the mail and made by the "registrars" is Exhibit 271. Of particular note is an alleged qualification chart (Ex. 167) which lists innumerable supervisory jobs

could be obtained by the student. All of these were
n to be false.

Finally, after some controversy in 1957, the various
anies of United Jet Schools, United Jet Institute, and
onal Jet Training moved from San Francisco to Tampa,
lda. Despite the representations made to the prospec-
students to induce their enrollment, no student was
hired to a job and no student ever received a salary
presented to them in the mailed business reply cards,
ures and literature.

Like his co-appellant Babson, Appellant Victor J. Trial
nds the evidence in this case does not support the jury's
ng of guilt. Appellee submits and will demonstrate to
ourt that the jury's finding is in accord with the evidence.
Trial was a salesman from August 1956 to May 1957,
rd, p. 507). He sold 125 courses during this period.
rd, p. 1507, Ex. 315 through 322). There is direct
mony from three witnesses relative to his misrepresentations.
are Royce Herrier (Record, pp. 589-601) Robert Revo (Record,
7-622) and Robert Lams (Record, pp. 626-635). Herrier and
ere placed in contact with appellant Trial through the media
mail. (Record, pp. 589-627). In one instance an advertise-
nserted by appellant Babson (Ex. 57) was a source of
udent coming into contact with Trial (Record, p. 590). As
all cases, the prospective student's wife was present.
d, pp. 591, 618, 627). In the case of Herrier, appellant Tria

e the following representations:

(1) Shop training available and student would be able
vork on engines (2) there would be good training (3) student
d be so qualified he could demand a job as a supervisor
instructor (4) wages would be around $1,000.00 to $1,200.00
nth (Record, pp. 592, 593, 604, 605). Trial gave to Herrier
rm letter showing salaries that the student would receive.
209). Following enrollment by Trial, Herrier received
rature in the mail concerning free placement service offered
student. (Record p. 598, Ex. 213).

Trial enrolled Robert Revo (Record p. 618, Ex. 226).
nrolling Revo, Trial made the following false representa-
s: (1) the course would train him to be an inspector or
rvisor (2) he could earn $10,000.00 to $12,000.00 per year,
he top airlines would honor this school (Record p. 619),
he course was $500.00. (Record p. 620). Thereafter, Revo
ved correspondence from United Jet Institute (Ex. 230).
enrolling, it took 9 months to receive the first lessons.
rd pp. 620-625).

Robert Lams was likewise enrolled by Trial (Record p. 628).
rolling Lams, after Lams had sent a business reply card
to United Jet Institute (Record p. 627), Trial made the
wing false representations: (1) upon graduation he would
specialist earning $1,300.00 a month (2) the opportunities

r employment were great--United Air Lines was a source employment; (3) the school would help students get a ɔ (Record, pp. 629-630, 634-636).

After enrolling, Lams contacted United Air Lines l Pan American. He found that Trial's representation ıt United Air Lines would hire United Jet Institute dents was false, as this airline did not endorse the ool and had no intention of hiring any of its students cord, pp. 631, 633).

The representations made by Trial to these three men e completely false.

Trial assisted in this fraud and scheme by passing business reply cards (Ex. 17 (Record, pp. 1527-1529). hough Trial asserts he was unfamiliar with what type ɔackground the student was to have for enrollment, yet ıdmits he was familiar with Babson's sales presentation 161) wherein the objectives of the course are set (Record, pp. 1526-1527).

Trial enrolled an apprentice bricklayer, a sausage ɛer, (Record p. 1539), a restaurant owner (Record, p. 4), a greens keeper for a golf course (Record p. 1546) lother individuals (Record, pp. 315-322) whose back- ɔnd clearly indicates they were not of the qualifications aptitude to enroll in such a course.

Trial was closely associated with Babson before the
ıture as a salesman in a correspondence course. (Record p. 1523
; representations were those of Babson. He placed in the mail
ıudulently contrived business reply cards.

The evidence against Trial was sufficient to sustain
conviction. It is significant that the jury convicted him
the substantive counts of the indictment in which he alone was
defendant of the false representations in Count 16, dealing
h his sale of the course to Robert Revo and Count 20 relative
his enrollment of Royce Herrier. Having made false represen-
ions in these two instances, he also became part and parcel
the conspiracy count, Count 1 as set out in paragraphs 3(A)
(C) (D) and paragraphs 4(a) (c) (1) and (k) of Count 1.

Although Trial claims he was no longer associated with
son, he was operating a franchise of National Jet Training
rse for 18 months after leaving United Jet Institute.
ord p. 1518).

ARGUMENT

. SUBSTANTIAL EVIDENCE OVERWHELMINGLY SUPPORTS THE JURY'S VERDICT OF GUILTY AS TO APPELLANT BABSON ON SEVENTEEN COUNTS OF THE INDICTMENT; AND AS TO APPELLANT TRIAL ON THREE COUNTS.

(NOTE: Since much of the evidence in the Record ffects both Babson and Trial, the Government has combined ie arguments as to sufficiency of the evidence on all .ements of the crime in this section. We therefore now swer Specifications of Error 1 and 2 of Appellant Babson, wit: that the Government failed to prove a conspiracy existed d that the evidence was insufficient to support a finding criminal intent on the part of Babson, and Specifications Error 1 and 2 of Appellant Trial, to wit: that there is substantial evidence to support the verdict against ial on the substantive counts (counts 16 and 20) and that ere is no substantial evidence to support a finding that ial was involved in the conspiracy).

Appellant's brief for Babson asserts, without justifiable port, that the jury's verdict of guilty is contrary to evidence, either as to the conspiracy count (count 1) the substantive counts (counts 2, 3, 4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 18, 20, and 21).

Like the Israelites seeking a scapegoat, Babson seeks cast the blame for the failure of his course and

nstructional effort upon another, James Porter, a co-
onspirator. This feigned attempt to extricate himself from
esponsibility runs through Babson's entire testimony on
rect and cross-examination; the evidence clearly demon-
rates that his attempts to establish his innocence were
tile. The trial record, including exhibits and his
stimony, which covers in excess of 1,600 pages, directly
ints to his mire of involvement in the fraudulent scheme.
y as he did to place the mantle of blame on James Porter,
is clear that Babson's nefarious activity was begun
fore Porter came upon the scene.

Mr. Porter was hired to write the course in March of
56. (Record, p. 339). By Appellant Babson's own
nission, no one ever checked with the airlines or the
ation industry until July or August of 1956 to determine
salaries then being paid by them to aviation and jet
hanics, the job classification and the experience or
ining required for hiring employees. (Record, pp. 1589,
5). However, on February 26, 1956, prior to Porter's
ociation with Babson, Babson set forth his initial seed
fraud in an advertisement placed in the San Francisco
miner (Ex. 57). In this advertisement Babson represented
t students would obtain specialist status and would have
e placement upon completion of his course and that his
rse was approved by the airline and aviation industry.

The myriad of fraudulent representations directly ttributable to Babson are replete throughout the record, ut all one has to do to refute Babson's assertion that is conviction is unsupported by the evidence, is to look t Exhibit 161. Exhibit 161 is Babson's sales "pitch" presentation) as given to his "registrars," wherein he tates the leads are "qualified"--this means that the nrollees are qualified to take the course. As previously cated, the record discloses that the individuals enrolled ere not qualified, had little mechanical background, had nly a high school level of education and were loggers, rmers, cement finishers, upholsterers, baggage handlers, prentice brick layers, and an insurance claims agent. In hibit 161, Babson suggests to his "registrars" that "they ay the part of qualified and well trained registrars." also suggested in Exhibit 161 that mention of placement rvice be made to the prospective student. This representation of job placement was without foundation and primarily signed to induce the student to buy the course. In this ne sales presentation, Babson infers govermental approval the course by suggesting to the "registrar" that the ndent be questioned relative to any involvement in versive activities. Further evidence of Babson's udulent intent is Exhibit 158a, a picture of a large air shop, heavily equipped and staffed. At the top of

his picture is the caption: "United Jet Institute, anufacturer, Maintenance and Military." United Jet nstitute was never so equipped and staffed. Similarly of ote, Appellant Trial's testimony shows that no student as given an opportunity to fully look at the sales kit Ex. 158) of which the picture, Exhibit 158a, is a part. is respectufully suggested that the photograph, Exhibit 8a, was principally inserted into the sales kit to audulently misrepresent to prospective students that the ene therein depicted was the facility of United Jet aining, United Jet Institute and National Jet Training, d thus entice a prospective student to enroll in the urse at a tuition ranging from $400 to $600.

A letter to United Airlines, Exhibit 286, is further dence of Babson's participation in this fraudulent scheme. s letter was written by Babson in June 1956. In the ter he states that the course was training jet specialists would cover the latest type of jet engines. Contrary this representation the record shows that the correspon- ce course covered, at the most, a J-34 Westinghouse ine. This engine was obsolete. Exhibit 286 further onstrates appellant's outright and reckless proclivity making fraudulent misrepresentations by his assertion t leading manufacturers were assisting on engineering a and on the preparation of the training manual. No

anufacturer or airline officials were consulted or con-
acted relative to this course until July or August of 1956.
e only source material for the literature and lessons
at the students received was a parts and maintenance
nual (Ex. 244) which was given to Porter by Babson in
rch of 1956. James Porter lifted much of the information
ntained in Exhibit 244 in preparation of the lessons
x. 62).

Exhibit 271 is a sales presentation of co-conspirator,
ed Lee. (Record, p. 839). Babson gave his imprimatur
the fraud by approving Lee's sales presentation. (Record,
1614). In this presentation, Lee, a co-conspirator,
aims that hundreds upon hundreds of engineering experts
om major aeronautical firms were giving up-to-date
formation to the school. The record is completely devoid
such cooperation and assistance, and the fraud is clearly
ablished by Babson's own admissions that he at no time
r had any personal contract with the airlines.

In Exhibit 271, Lee asserts that most of the students
olled in the course had seventeen years experience with
lines. The only student known to be enrolled in the
rse who was associated with the airlines was the witness,
nard Haynes. Lee repeats Babson's assertion concerning
high educational background and qualifications of the
dents that were and would be enrolled in the course.

; is interesting to note that the witness Pollard, an
fficial of the United Airlines, testified that the course
ıs not approved or recognized by that airline. (Record,
). 1174-1176). Despite these assertions, which were approved
Babson and his direct representations and ratification
such statements, as to the quality and nature of the
urse, the record is uncontradicted that the only tools to
sist Porter in preparing the course were Exhibit 244,
ich he received from Babson. (Record, p. 336). Addi-
onally, the record shows that the in preparing the lessons,
rter was one step ahead of the students in drafting
ese documents. (Record, p. 742). An additional feature
ling to appellant's knowledge of the fraudulent activities
ried out in this organization was his refusal to fire
defendant, Gordon L. Braden. (Record, p. 473). When
. Jenny Speights in 1957 called to his attention in a
ter, the fraudulent misrepresentations made by that
ividual, appellant retaliated by calling the Better
iness Bureau "a bunch of hicks." (Record, pp. 1618-
9; Exs. 169, 170). When Porter complained to the
ellant that his business reply cards and other mailable
ters showed that the students would obtain a salary of
000 to $10,000 (Record, pp. 763-764) appellant continued
send the business reply cards containing these false
resentations. The record is replete with representations
e by Babson that the school would have an engine for the

udents to work on and that tools would be provided. ecord, pp. 601, 784A, 836-837, 1007-1008). The only gine that was supplied was a basket job, amounting to nk, as was testified to by his co-defendant and co-conirator, Gordon L. Braden, and Appellant Victor J. Trial. ecord, pp. 1394, 1535).

The record is amply supported to the effect that most not all of the documents sent through the mail under caption United Jet School, United Jet Institute, United Training and National Jet Training contained fraudulent representations. Babson either authored or approved all these documents. (Record, pp. 1602, 1614-1618). He olled students and sent out such business reply cards ore James Porter joined them and even before the course written. He likewise had not verified the contents of se representations with any representative of the aires or aviation industry. (Record, p. 1589). Babson told lents Donald Freeman and Jack Giolitti in the middle of 1956 he had placed graduates of the school with jet and T.W.A. (Record, p. 78). By his own testimony re were no graduates from the school as late as September . (Record, p. 1620). In Exhibit 277, written by Babson uly of 1956, Babson informed the Better Business Bureau os Angeles that the course was airline approved. The imony of witnesses Pollard, Martin, Hepburn, Champeau

d Rieger refutes such approval. (Record, pp. 943, 965, 94-1103, 1141, 1154). Again in Exhibit 277, Babson stated e course was approved by the vice-presidents in charge maintenance for manufacturers and airlines. This sertion is an outright fraudulent misrepresentation, as ther Haynes, Porter, or anyone else on behalf of Babson l his several schools, according to appellant's own timony, until July or August of 1956, contacted any or airline or jet manufacturer. (Record, p. 1605).

The record in this case, voluminous as it may be, is lete with assertions made by Babson that conclusively ablish his participation in the fraud and, in fact, his ation of this scheme and artifice to defraud. These resentations are that the trainees would be supervisors cord, p. 499); that jobs would be provided (Record, pp. , 850); there would be job placements (Record, pp. 696, , 1001); students would be better than mechanics and ssified as jet specialists (Record, pp. 1002, 1047); stance for employment would be provided all over the ted States (Record, p. 1051); that students would have er than average salaries (Record, p. 994); and that s similar to Exhibits 17 and 18 were supplied to the smen by Babson by the thousands. (Record, pp. 833-834, 5.

Co-conspirators Lee and Nau and the co-defendant Braden

stified that the appellant told the students that they re to be specialists (Record, pp. 844-846, 994, 1428); at there would be a security check; that the airlines re hiring graduates and were told to paint a rosy picture d use their imagination to sell the course (Record, p. 45). Co-conspirator Oller testified that the Appellant bson was in charge of all publicity relating to the school. ecord, p. 1476). Babson told Victor Trial that the purpose this course was set forth in the qualification chart, ibit 167, which is likewise further set forth on the st page of the salesmens' sales kit (Ex. 158; Record, pp. 6-1527). Victor Trial likewise placed business reply ds on windshields and in householders' boxes, such as ibit 17 (Record, p. 152) which he secured from Babson. did Lee and Nau. (Record, pp. 833, 995). The very nature the fraud activity on the part of Babson is clearly onstrated by his adoption in toto of a qualification rt (Ex. 324) formerly used by appellant in a home study rse for practical nursing which he had previously operated. ibit 324 was changed as to caption only and used as a lification chart for individuals who were to be trained et specialists, inspectors, turbo prop specialists and ysts.

During the course of the trial approximately twenty-four viduals, who had enrolled in the course testified that initially became acquainted with Babson's variously

ned schools upon receipt of a business reply card
ilar to Exhibits 17, 18, and 19, which they found in
eir mail box, on their windshield, or in supermarkets.
st of these student witnesses testified they mailed these
iness reply cards back to the addressee and thereafter
e contacted by registrars, at which time they were told
the salesman many of the false representations concerning
course, the lessons and their future which induced them
enroll in the course. Babson having authored or approved
se fraudulent and false business reply cards and letters
taining fraudulent misrepresentations and thereafter
ing sent them under his signature or the signature of
cials of his schools, it goes without saying that the
ord in this case clearly establishes that Babson con-
ed with others named in the indictment to defraud the
ic and the fraud was initially conceived against the
ic through the use of the United States mails, all of
h was in violation of Title 18 U.S.C. Section 1341.

I. COLLOQUY BETWEEN THE FOREMAN OF THE JURY AND THE COURT, HELD IN OPEN COURT, PURSUANT TO A REQUEST OF THE JURY, FOR FURTHER INSTRUCTIONS, AND ATTENDED BY ALL PARTIES, DOES NOT VIOLATE ANY SUBSTANTIVE OR PROCEDURAL RIGHT OF APPELLANT.

During the course of jury deliberation, the jury dressed a request to the Court to be allowed to receive pplemental instructions from the Court. The Court anted the request. (Record, p. 1691).

Supplemental instructions were given. The Court then ked the jury whether there was anything further in the y of instructions desired. The foreman asked a question out conspiracy and the Court gave some additional in-ructions about conspiracy. (Record, p. 1693). The Court n again asked if there was anything further. The fore-n, after consultation with other jurors told the Court: o." (Record, p. 1693). Appellants assign this procedure error.

The procedure of recalling the jury for further tructions has always been held to be within the discretion the trial Court. Allis v. United States, 155 U.S. 117 94). This Court has followed the Allis rule. In en v. United States, 186 F. 2d 439 (1951), a mail fraud al, the jury had deliberated twenty-four hours and uested additional instructions through the foreman. s Court, noting inter alia, that the supplemental tructions tended to be to Appellant's advantage,

nsel, which is the case with appellant Babson, should
ercise discretion in presenting to the Court points which
e devoid of merit. See: Mitchell's review of "Effective
ellate Advocacy", 64 Harv. L. Rev. 350, at 352, and
thern Securities Company v. United States, 193 U.S. 197,
-401 (1903).

This specification of error is bottomed upon colloquy
ween trial counsel for Babson and the District Judge at
e 1692 of the record. Whereas counsel on appeal for
son states that the jury "proceeded to confer in open
rt for a period of time" (Op. Br., p. 21) and that the
al Judge, " . . . in effect, told the jurors that they
ld then and there openly discuss and reveal any areas
ifficulty" (Op. Br., p. 22), we suggest this is an
rranted characterization of the record.

The trial Judge, in response to counsel's objection
the jury was conferring in open court, stated to the
rary (Record, p. 1692). Counsel never assigned the
er as error when invited to make objections (Record,
594-1696) nor was the subject again ever mentioned
ord, p. 1691-1696).

Counsel seeks to unfairly characterize the record when
ates there was "an instruction that the jury engage
en conference." The short portion of record between
e 1692 and 1696 lends no support to this characterization
, not surprisingly, counsel is unable to support the
sition urged as error with a case of any vitality.

. THE GIVING OF SUPPLEMENTAL INSTRUCTIONS RELATING GENERALLY TO CONSPIRACY DOES NOT REQUIRE THE COURT TO ALSO RE-INSTRUCT THE JURY ON OTHER PRINCIPLES OF LAW APPLICABLE TO THE CASE, ESPECIALLY IN THE ABSENCE OF PROPER OBJECTION THERETO.

Specification of Error 4 of Appellant Babson is that Trial Judge erred, after the giving of supplemental in-ıctions as to conspiracy, in not proceeding to give further ;ructions on "reasonable doubt" and other instructions ›rable to the defense.

The Court need not reach this assigned error on appeal, ppellant Babson stands convicted on sixteen counts in tion to the one to which the Specification of Error relates the sentence imposed by the Court is within the allowable t for any one count. Thus, the Court may consider the iction as proper on any count and need not consider the ification herein as to count one. Russell v. United States, F. 2d 520 (9 Cir. 1963); Sherwin v. United States, Unreported Cir. No. 18,200, decided June 11, 1963.

The instructions requested and given pertained only to one, the conspiracy count, and the Court told the jury as to the other counts they were to proceed independently ssess them. (Record, p. 1693).

However, should the Court proceed to an examination of Specification of Error, it should be noted that considera-ıon appeal--on the ground stated by appellant--is barred

:ause of failure to comply with Federal Rules of Criminal

›cedure, Rule 30. Although counsel states, in the opening

.ef;

> "(The Court) Refused to instruct again upon 'reasonable doubt' and other instructions favorable to the defendant's."

Opening Brief, page 17, a casual reading of the colloquy

ween trial counsel and the Court shows to the contrary:

> "MR BURNS: Before Your Honor leaves the bench---
>
> THE COURT: Just a moment. It may be counsel has some suggestions.
>
> MR BURNS: No, I am just requesting that before Your Honor leaves the bench and after the jury retires again to deliberate, that we would like to make a remark to Your Honor.
>
> THE COURT: If it has to do with any of the instructions thus far given to the jury, I will ask for exceptions now so that I may---
>
> MR BURNS: I don't think they should be made in the presence of the jury, Your Honor.
>
> THE COURT: All right, go ahead."

Record, pp. 1693-1964.

There was no unequivocal request for any charge relat-

to reasonable doubt, presumption of innocence or "other

ructions favorable to the defendant." "A suggestion"

is honor was the opening gambit and the actual request to

the indictment and define further the acts necessary for

piracy. (Record, pp. 1693-1694).

Under these circumstances the Court should not consider .e alleged error. Where, as here, the supplemental instruc- ons also contained the Court's statement that all of the ements of conspiracy must be proven beyond a reasonable ubt (Record, p. 1689) and that the instructions be con- dered only as to count one, (Record, p. 1693) it can fely be assumed that the presumption that the jury had mind all the instructions given operates herein and cludes this matter being treated as error under Federal .es of Criminal Procedure, Rule 52(b). Compare: Speak v. ted States, 161 F. 2d 562 (10th Cir. 1947), at page 565.

. WITH ALL COUNSEL AGREEING THERETO IT IS NOT ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY IN PART BEFORE CLOSING ARGUMENTS AND IN PART AFTER CLOSING ARGUMENTS.

The presentation of evidence in the case was concluded ar noon on October 1, 1962. (Record, p. 1654). Instruc- ons by the Court to the jury were delivered following e noon recess. (Record, p. 1656). Closing arguments by unsel were presented on October 2, 1962, and final instruc- ons were given by the Judge to the jury thereafter. ecord, pp. 1681-1686). The jury retired to deliberate approximately 2:00 P.M. on October 2, 1962. (Record, p. 8).

All counsel were given opportunity to object to tructions, as to form or procedure, at all stages. At close of the first set of instructions (Record, p. 1678) at the close of the second (Record, p. 1687) no correc- ns, additions, suggestions or objections of any sort e made by counsel. (Record, pp. 1678, 1687).

To this procedure of "split instructions," appeal nsel assigns error. (Op. Br., Specification of Error 3, 10-16, and expending the largest portion of the opening ief upon the point.)

We respectfully submit the point is without merit. ll counsel (termed "capable" by counsel on appeal, Op. p. 15, para. 1, line 8) had no objection to the pro- dure, either at the time it took place, or on any

sequent objection to trial procedure. (e.g.: Motion for trial)

Counsel for appellant seeks to avoid the lack of ection below by stating that an objection need not be e to such practice, as it constitutes "plain error" er Rule 52(b) F.R.Crim, Proc.

It then becomes appellant's problem to eliminate e 30, F.R. Crim, Proc. If Rule 30 does govern, then error was assigned and the "error" should not be con- ered upon appeal. If Rule 30 does not govern, then it nerely a different procedure than that to which counsel ccustomed and should be unassailable upon appeal.

The extreme difficulty in which appellant labors is lighted by his saying that Rule 30 does not apply so as void its mandate for specifying error and then stating this same inapplicable Rule does apply and demands a edure different from that used. This serves only to light the fallaciousness of the point raised. (Compare 14 Op. Br. last paragraph with p. 15 first paragraph).

Finally, the case support for the argument wholly to bring any relevant authority to bear on the issue. omentary upon the Civil Rules, 25 Va. L. Rev. 261 and trict of Columbia Circuit cases are cited. All three e, Copeland v. United States, Medley v. United States, heeler v. United States, (cited in appellant Babson's

pening brief at page 13,) deal with the reading by counsel to the jury of instructions during counsel's argument. The practice is condemned because of the confusion, as one Court puts it, from

> ". . .instructions which reach the jury piecemeal from two or more lawyers. . . are likely to be less clear. . . than the elements of a charge which the judge has organized or which he delivers from the bench. The jury may fail to distinguish clearly between instruction and argument, when both come from or through counsel..." (emphasis added)

Copeland, supra, at page 769.

This same court then went on to hold that since counsel had not objected, no substantial right of the defendant had been violated and affirmed the conviction.

We respectfully submit that the reading by the Judge to the jury of the instructions in two distinct segments, with the concurrence of counsel, constitutes no error at all.

We note that in respect to this specification of error and to the specification of error complaining of the substance of the supplemental instructions that appellant Trial failed to join with appellant Babson in urging error.

WHERE APPELLANT VICTOR J. TRIAL WAS CHARGED WITH SUBSTANTIVE COUNTS OF MAIL FRAUD WITHIN FIVE YEARS OF THE RETURN OF THE INDICTMENT AND OF PARTICIPATING IN A CONSPIRACY BEGINNING PRIOR TO FIVE YEARS BEFORE RETURN OF INDICTMENT BUT ENDING WITHIN THE FIVE YEAR PERIOD, THE STATUTE OF LIMITATIONS DOES NOT BAR PROSECUTION.

Appellant Trial specifies as error the conviction on nts 1, 16 and 20 as being barred by the statute of itations. (Op. Br. for Trial, pp. 11-13).

The limitation of actions for mail fraud is five years, le 18 U.S.C., Section 3282.[22/]

The conspiracy is alleged to have begun on or about ruary 1, 1956, and continued to and including November 1, 1, well within the statute of limitations.

Appellant is charged with having participated in the piracy charged in count 1 and of having committed ain overt acts in connection therewith. The conspiracy inued well into the applicable limitations period, and l did not withdraw from the conspiracy. (See: Statement acts, p. 12).

It is only necessary that it be shown the conspiracy ted within the applicable limitations period and that vert act in furtherance thereof was committed during applicable limitations period. (See: unanimous opinion, his point, of the Court in Grunewald v. United States, J.S. 391, 394-5 (1957). This criteria is met. See: tement of Facts, p. 12).

Appellant Trial, having once joined the conspiracy, id not withdraw therefrom and cannot for the first time n appeal, argue that he did so as to "cut off" his iability.[23]

CONCLUSION

We respectfully submit that the judgment of conviction to each appellant be affirmed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

FREDERICK J. WOELFLEN
Assistant United States Attorney

APPENDIX

Reference Number		Page
	Exhibit 62.	3
	Record, pp. 73, 99, 127, 144, 183, 346, 366, 488, 495, 523, 540, 571, 609, 627, 642, 657, 673, 692, 888, 917, and 994.	4
	Record, pp. 100, 109, 128, 145, 154, 167, 178, 188, 233, 271, 303, 324, 368, 474, 489, 496, 523, 529, 541, 591, 609, 618, 642, 643, 674, 692, 889, 927, and 1638.	4
	Exhibits 14, 17, 23, 30, 43, 171, 271 and 277.	5
	Record, pp. 77, 110, 132, 148, 170, 190, 273, 370, 530, 542, 574, 619, 629, 693, 704, 719, 891	
	Exhibits 18a, 19, 20, 23, 24c, and 61.	5
	Record, pp. 77, 127, 132, 190, 272, 369, 423, 452, 497, 524, 543, 560, 573, 592, 605, 659, 667, 676, 910, 918, 925, 1019 and 1024.	
	Exhibits 14, 17, 24, 27, 30, 40, 43, 54 and 57.	5
	Record, pp. 78, 100, 131, 137, 190, 235, 278, 291, 304, 330, 335, 497, 524, 574, 592, 619, 629, 673, 693, 704, 718, 1382 and 1398.	
	Record, pp. 110, 115, 143, 151, 169, 186, 473, and 1068.	5
	Record, pp. 110, 191, 273, 325, 497, 513, 543, 575, 592, 593, 601, 611, 644, 659, 677, 694, and 896.	

Reference Number		Page
	Record, pp. 77, 82, 83, 134, 195 238, 275, 326, 347, 478, 506, 531, 573, 593, 620, 628, 645, 694, 717, and 815.	5
.	Exhibits 315, 322.	6
	Record, pp. 71, 98, 126, 384, 672, and 1391.	
.	Record, pp. 90, 115, 203, 237, 304 334, 535, 663, 690, and 707.	6
2.	Record, pp. 1094, 1153, 1154, 1174, and 1510.	6
3	Record, pp. 101, 348, 499, 501 and 595.	6
4	Exhibits 158a and 162.	7
	Record, pp. 105, 111, 122, 350, 351, 376, 377, 391-394, 457, 501, 502, 516, 596, 630, 660, 677, 721, 755, 1007, 1395 and 1396.	
5	Record, pp. 108, 349, 747, 748, 749, 768, 943, 949, 963, 1095, 1100, 1154, 1156, 1167, 1179 and 1180.	7
5.	Record, pp. 162, 576, 579, 631, 635, 705, 1154, 1166-1168, 1176, 1178, 1180, and 1183.	8
7.	Record, pp. 162, 579, 631-633, 705.	8
3.	Exhibit 244.	8
	Record, pp. 736, 1140.	
9.	Exhibits 23, 28, 43, 54, 57, 61, 73, 147, 148, and 161.	8
	Record, pp. 78, 110, 131, 149, 171, 191, 254, 273, 323, 360, 574, 598, 604, 629, 693, and 925.	
0.	Record, pp. 769, 961, 962, 1621.	9

Reference Number		Page
	Record, pp. 1476, 1491, 1552, 1569, 1570, 1575, 1588, 1602, and 1642.	9
	The limitations period was originally three years. 62 Stat. 828 (June 25, 1948). The section was amended in 1954 to provide a five year period. 68 Stat. 1145 [See: 1214, Section 12(a), formerly Section 10(a)], then renumbered on September 26, 1961, in 75 Stat. 648. The five year limitation was made applicable for offenses committed on or after September 1, 1954. 68 Stat. 1145.	32
	A defense that the statute of limitations bars the offense should be raised at the District Court level before trial and at trial. This was not done in the present case. Particularly where the question might be one of withdrawal from a conspiracy, the facts surrounding such action must be presented to the jury and a chance given to the Government to meet the issue. United States v. Dierker, 164 F.Supp. 304 (D.C. Pa. 1958).	33

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HIE K. BABSON and TOR J. TRIAL, Appellants, v. TED STATES OF AMERICA, Appellee.	NO. 18410 AFFIDAVIT OF SERVICE BY MAIL

TED STATES OF AMERICA)
THERN DISTRICT OF CALIFORNIA) ss

FREDERICK J. WOELFLEN, being first duly sworn, deposes says:

1. That on September ___, 1963, he deposited in the ed States mails, San Francisco, California, in the e entitled action, an envelope bearing Air Mail Special very postage and containing a copy of Consolidated f of Appellee, addressed to: James W. Heyer, Esq., er Building, 1700 Broadway, Denver 2, Colorado, Attorney Appellant Archie K. Babson, this being the last known ress of the counsel for Appellant and at which place is a delivery service by United States mails from d Post Office.

2. That on September ___, 1963, he deposited in the ted States mails, San Francisco, California, in the ve entitled action, an envelope bearing First Class

cial Delivery postage and containing a copy of
solidated Brief of Appellee addressed to: James G.
lis, Esq., 225 Bush Street, San Francisco 4, California,
orney for Appellant Victor J. Trial, this being the
t known address of the counsel for Appellant and at
ch place there is a delivery service by United States
ls from said Post Office.

FREDERICK J. WOELFLEN
Assistant United States Attorney

scribed and sworn to before
his ___ day of September, 1963.

k, United States Court of Appeals
the Ninth Circuit